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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,
Petitioner,

-vs-

LAMONT L. HOLT,
Respondent.

On Petition for a Writ of Certiorari to
the Ohio Court of Appeals, Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In light of ***United States v. Salvucci***, 448 U.S. 83 (1980), whether a criminal defendant can rely on the prosecution's theory of the case to meet the defendant's burden of proving that he held a legitimate expectation of privacy in the area searched.

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OPINIONS BELOW

The order of the Court of Common Pleas of Franklin County, Ohio, is not reported, but it is a part of the appendix to this petition. See **Appendix H**. The main opinion of the Ohio Court of Appeals, Tenth Appellate District, likewise is not officially reported, but it can be

found at 1997 Ohio App.LEXIS 4827, and it is part of the appendix. See **Appendix D**. The memorandum decision of the Tenth District denying reconsideration is not reported but is a part of the appendix. See **Appendix F**. The order of the Ohio Supreme Court declining discretionary review is reported at 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998); *see* **Appendix B**.

JURISDICTIONAL STATEMENT

Petitioner, the State of Ohio, seeks review of a judgment of the Ohio Court of Appeals, Tenth Appellate District, entered on October 30, 1997. In that judgment and accompanying opinion, the Tenth District affirmed the order of the Franklin County Common Pleas Court, which had suppressed crack cocaine based on respondent Holt's claim of a violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution.

In a journal entry and decision rendered on December 9, 1997, the Tenth District denied petitioner State of Ohio's motion for reconsideration. The Ohio Supreme Court declined discretionary review in an entry filed on February 25, 1998. This petition for writ of certiorari was timely filed within ninety days of the latter date. See United States Supreme Court Rules of Practice, Rule 13.1.

Section 1257(a) of Title 28 of the United States Code confers jurisdiction on this Court to review the judgment of the Ohio Court of Appeals, Tenth Appellate District, by writ of certiorari. This petition addresses the federal question of whether the prosecution's theory of the case can be relied upon in determining whether a criminal defendant held a legitimate expectation of privacy in the area searched. The Tenth District did not rely on any independent state ground in addressing this "standing" issue.

The Tenth District's judgment is a "final judgment" within the meaning of Section 1257(a). Given the suppression of the crack cocaine at the heart of the indictment, no further proceedings can be had in the Ohio courts, except the *pro forma* dismissal of the indictment for lack of evidence. Since "nothing remains to be done but the mechanical entry of judgment by the trial court," the "final judgment" requirement is met. ***Pope v. Atlantic Coast Line R.R.***, 345 U.S. 379, 382 (1953); *see also*, Ohio Criminal Rule 12(J) (barring further prosecution absent newly discovered evidence). Even if a trial could still be had, the Tenth District's judgment would still qualify as a "final judgment" under Section 1257(a). ***New York v. Quarles***, 467 U.S. 649, 651 n. 1 (1984).

Finally, a writ of certiorari would be properly directed to the Ohio Court of Appeals, as opposed to the Ohio Supreme Court. The latter court merely declined

discretionary review and therefore expressed no opinion on the merits. *See* Ohio Supreme Court Rules of Practice, Rule II, § 1(A)(2) & (A)(3), and Rule III, § 6(A) & (B); Ohio Supreme Court Rules for Reporting of Opinions, Rule 2(I)(2); *see also*, ***American Railway Express Co. v. Levee***, 263 U.S. 19, 20-21 (1923).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In pertinent part, the Fourteenth Amendment provides, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

Respondent Lamont Holt was indicted on one count of possession of crack cocaine in an amount exceeding ten grams but less than twenty-five grams. This offense is a second-degree felony in Ohio, carrying a possible prison term of up to eight years in prison.

Respondent Holt filed a motion to suppress, contending, *inter alia*, that the search or seizure leading to the discovery of the crack cocaine had violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution. Before the evidentiary hearing on the motion to suppress, the State of Ohio raised respondent Holt's lack of "standing" to suppress the crack cocaine. *See* **Appendix A**.

On the morning of April 15, 1997, the common pleas court held the suppression hearing. Columbus Police Officer Todd Rhodeback testified that he was working

as a patrol officer on February 10, 1997, when he stopped a car for speeding at approximately 1:15 a.m. (Tr. 20-24) Other officers were present at the traffic stop, including Officer Smith and Officer Wood. (Tr. 25)

Pursuant to his customary procedure, Officer Rhodeback began shining his spotlight onto the stopped vehicle. (Tr. 28) There was a driver and a front seat passenger. (Tr. 27) In addition, respondent Holt was seated in the backseat on the passenger side of the vehicle. (Tr. 23, 27, 43) Respondent Holt was "fidgeting around" and moving his shoulders side to side, as if he was digging into his pockets. (Tr. 28, 29, 58-59) As Officer Rhodeback exited his cruiser, respondent was "dipping his torso forward as if to be hiding something" and moving his hand in a downward motion. (Tr. 29, 59-60) Officer Rhodeback became concerned that respondent Holt might be trying to hide a weapon. (Tr. 31)

As Officer Rhodeback approached the driver's side of the stopped vehicle, Officer Smith took up a "cover" position on the passenger side of the car. (Tr. 32, 33, 62, 64) Officer Rhodeback told Officer Smith that respondent needed to be taken out of the car. (Tr. 32-33) Officer Rhodeback testified, "There's a reason why there's that much movement in the car." (Tr. 65)

While Officer Rhodeback talked to the driver, Officer Smith asked respondent to exit the vehicle, and respondent complied. (Tr. 33, 69) Officer Smith performed a ***Terry*** pat-down search of respondent for the purpose of officer safety, but the pat-down did not reveal any weapons. (Tr. 33, 34) The other occupants were likewise removed from the car. (Tr. 34, 35, 68-69)

Officer Rhodeback then went into the car through the rear passenger-side door to conduct a protective search at the place where respondent had appeared to be

hiding something. (Tr. 34, 37, 65, 72) He found a white knit glove approximately six to eight inches under the front passenger seat; he pulled out the glove and, shining his flashlight, he looked inside and saw one baggy having a large amount of crack cocaine and another baggy containing crumbs. (Tr. 34, 37-38, 39, 73, 75-77) The baggies were located in the palm part of the glove. (Tr. 39-40) Respondent was placed under arrest after the contraband tested positive for cocaine. (Tr. 41)

The baggies were turned into the police property room. (Tr. 46) A records check revealed that the car belonged to a relative of the driver. (Tr. 53) After his arrest, respondent said that "they weren't his drugs." (Tr. 82) Respondent also said that he had been trying to hide a 40-ounce bottle of beer, which he had been sipping from. (Tr. 67, 78-80) However, the bottle was too big to have slid on the floor from the back seat to the front seat area, where

police found an *unopened* 40-ounce bottle. (Tr. 77-80)

Columbus Police Officer Clint Smith testified that he too saw respondent making forward and downward movements in the rear passenger seat as if respondent was attempting to hide something on the floor. (Tr. 89, 91, 92) The area of town where the traffic stop occurred is an area where its very common to find narcotics and firearms, and therefore there was a need to remove respondent from the vehicle. (Tr. 99) After a brief conversation with Officer Rhodeback, Officer Smith approached the passenger side of the car and asked respondent to exit the vehicle. (Tr. 90) Respondent exited the vehicle, and Officer Smith performed a brief pat-down search and decided to place respondent in his cruiser. (Tr. 94) The other two occupants of the car were removed from the car as well. (Tr. 94)

Respondent was being placed in the cruiser because the officers had not yet had an opportunity to check

the area of the furtive movements for weapons. (Tr. 104) Just as Officer Smith was placing respondent in the cruiser, Smith saw that Officer Rhodeback was conducting the search of the vehicle. (Tr. 95) All of this occurred within the first two or three minutes of the traffic stop. (Tr. 106-107)

The defense presented no evidence. After the close of the evidence, the common pleas court heard arguments. The prosecution again raised respondent's lack of standing to complain about the search. *See* **Appendix A**. The defense counsel conceded the lack of standing to contest the search, but counsel contended that respondent had standing to contest his own seizure. *See* **Appendix A**. Extensive discussions followed in which the prosecution questioned respondent's standing to seek suppression. *See* **Appendix A**.

The common pleas court nevertheless sustained the motion to suppress. *See* **Appendix A**. The common

pleas court filed its formal entry sustaining the motion to suppress on April 22, 1997.

Petitioner State of Ohio timely appealed and raised two assignments of error. One of the State's contentions under the first assignment of error was that respondent lacked standing to complain about the search. *See* **Appendix A**.

In a judgment and opinion rendered on October 30, 1997, the Ohio Court of Appeals, Tenth Appellate District, affirmed the order of suppression. After noting that respondent had "the burden of demonstrate that he * * * ha[d] a reasonable expectation of privacy in the area searched," the Tenth District found that respondent *did* have standing to contest the search of the glove under the front passenger seat. The Tenth District relied in part on the prosecution's theory of the case. *See* **Appendix A**.

Petitioner State of Ohio timely filed a motion for reconsideration, contending that the Tenth District's focus of the prosecution's theory of the case was improper in light of ***United States v. Salvucci***, 448 U.S. 83 (1980). *See* Motion for Reconsideration, at 3-5. In a journal entry and memorandum decision filed on December 9, 1997, the Tenth District denied the motion for reconsideration. In doing so, the Tenth District contended that *the prosecution* had the burden of proving the absence of standing. *See* **Appendix A**.

Petitioner State of Ohio thereafter filed a timely appeal in the Ohio Supreme Court. The State again raised respondent's lack of standing. With two justices dissenting, the Ohio Supreme Court declined discretionary review on February 25, 1998. ***State v. Holt***, 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998).

ARGUMENT

A CRIMINAL DEFENDANT CANNOT RELY ON THE PROSECUTION'S THEORY OF THE CASE TO MEET HIS BURDEN OF PROVING THAT HE HELD A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

This case raises an important question regarding the burden of proof to be borne by criminal defendants seeking the suppression of evidence. In its initial opinion, the Ohio Court of Appeals, Tenth Appellate District, correctly acknowledged that "a defendant has the burden to demonstrate that he or she has a reasonable expectation of privacy in the area searched." This statement was consistent with ***Rakas v. Illinois***, 439 U.S. 128 (1978), in which this Court stated that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." ***Id.*** at 131 n. 1. A defendant "bears the burden of proving * * * that he had a legitimate expectation of privacy * * *."

Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980).

This burden-of-proof principle should have led to the rejection of respondent Holt's suppression motion. The trial prosecutor frequently raised the issue of standing, not only in terms of the car but also in terms of the *items found in the car*. The prosecutor even cited ***Rakas***, which itself discussed "standing" in terms of both "the automobile" and "the property seized." ***Rakas***, 448 U.S. at 148. The prosecutor's comments were more than sufficient to put respondent on notice to meet his burden of proof. ***Id.*** at 131 n. 1. Notwithstanding those comments, respondent Holt provided no evidence of any legitimate expectation of privacy on his part in the area searched.

In its initial opinion, the Tenth District effectively did away with respondent's burden of proof. The Tenth District based its finding of standing on two factors: first, the State's "entire theory" of prosecution that the glove

or its contents "belonged to Mr. Holt"; and, second, the beliefs of police personnel that defendant had removed the glove from his pocket prior to placing it under the front passenger seat. Opinion, at 12. These redundant factors did not support a finding of a legitimate expectation of privacy.

The Tenth District misconceived the State's theory of prosecution. *Possession*, not ownership, was the test of this prosecution. In any event, the Tenth District erred in focusing on the State's theory of prosecution. Such a focus resurrected the discredited "automatic standing" rule of ***Jones v. United States***, 362 U.S. 257 (1960). ***Jones*** held that, "[i]n cases where possession of the seized evidence was an essential element of the offense charged, * * * the defendant was not obligated to establish that his own Fourth Amendment rights had been violated, but only that the search and seizure of the evidence was unconstitutional." ***United States v. Salvucci***, 448 U.S. at 87. One of the rationales for

this "automatic standing" rule was the "vice of prosecutorial self-contradiction." ***Id.*** at 88. The ***Jones*** Court believed the State should not be allowed to argue simultaneously that the defendant possessed the illegal drugs but that the defendant lacked standing to complain about a search leading to those same drugs. ***Jones***, 362 U.S. at 263-64.

Essentially, the Tenth District was relying on the same notions of "prosecutorial self-contradiction." The Tenth District used the State's charge of crack cocaine possession as evidence to establish that defendant had standing. There is no real difference between, on the one hand, bestowing "automatic standing" on the basis of "prosecutorial self-contradiction," and, on the other hand, finding standing based on the State's charge. In both situations, the charging instrument -- the State's theory of prosecution -- is being used as a proxy for standing.

The problem with the Tenth District's analysis is that this Court overruled the "automatic standing" rule in 1980 in ***United States v. Salvucci, supra***. In doing so, this Court expressly rejected concerns about prosecutorial self-contradiction:

> [A] prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure.

Salvucci, 448 U.S. at 88-89. As demonstrated by the decision in ***Rakas***:

> [A] prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction.

Salvucci, 448 U.S. at 90.

Relying on ***Rawlings v. Kentucky***, 448 U.S. 98 (1980), the ***Salvucci*** Court stated, as follows:

> The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation. As we

> hold today in *Rawlings v. Kentucky*, *post*, p. 98, legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest.

Salvucci, 448 U.S. at 91.

> We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.

Id. at 92.

> [N]either prosecutorial "vice," nor the underlying assumption of *Jones* that possession of a seized good is the equivalent of Fourth Amendment "standing" to challenge the search, can save the automatic standing rule.

Id. at 93.

After ***Salvucci***, there is no "automatic standing" in possessory drug cases. Even though a defendant is charged with a possessory drug offense, the defendant must go further and show that he personally held some legitimate expectation of privacy in the area searched. ***Id.*** at 92, 93. This showing must be made through evidence

introduced in the trial court, not through the prosecution's allegations in pleadings or through the prosecution's theory of the case. ***United States v. Zermeno***, 66 F.3d 1058, 1062 (9th Cir. 1995). In light of ***Salvucci***, the Tenth District erred when it relied on the State's theory of prosecution as a basis for finding a legitimate expectation of privacy.

In the State's motion for reconsideration, the State specifically raised the foregoing contentions, but the Tenth District did not address them. Instead, the Tenth District exacerbated its earlier error by expressly shifting the burden of proof to the prosecution. The Tenth District stated:

> **No evidence was presented which indicated that the glove was not his.** No warrants of any kind were involved in the case. **The state of Ohio did not demonstrate any lack of standing either in the trial court or on appeal.** Given the absence of any warrants, **the state of Ohio had the duty to go forward with evidence of a lack of standing** for Lamont Holt if the state wished to avoid the consequences of the illegal search conducted. (emphasis added)

These statements shifting the burden of proof not only contradict the Tenth District's initial opinion but also contradict the decisions of this Court in ***Rakas*** and ***Rawlings***.

The Tenth District was confused. To be sure, given the warrantless nature of the search, the State bore the burden of proving that the search was justified by probable cause or by some other exception to the warrant requirement. ***Xenia v. Wallace***, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988). Nevertheless, the State's burden to prove justification must be distinguished from a criminal defendant's threshold burden to prove that his own legitimate expectation of privacy was invaded. In the latter context, the State need only *raise* the issue in a sufficient manner to alert the defendant to the issue; the burden then falls on defendant to prove that he held a legitimate expectation of privacy in the area searched. ***Rakas***, 439 U.S. at 131 n. 1. Despite the trial prosecutor's repeated efforts in raising the issue, respondent

Holt did not meet his burden of proving a legitimate expectation of privacy in the area searched.

Respondent Holt may attempt to justify the Tenth District's decision on other grounds. Respondent may contend that the police officers' observations were sufficient in their own right to demonstrate he held a legitimate expectation of privacy in the glove under the front passenger seat. However, the police officers' observations at most showed that respondent had precipitously hidden the glove and cocaine under the front passenger seat. Such a precipitous bailment is insufficient to create a legitimate expectation of privacy in someone else's car, given the open container used by respondent (a glove), and absent any proof of consent to the bailment by the driver. *See* ***Rawlings***, 448 U.S. at 105-106. Mere ownership of contraband is insufficient to create a legitimate expectation of privacy when such contraband is situated within or on someone else's

property. ***Id.***

Respondent Holt might also attempt to justify the Tenth District's judgment on other grounds by contending that his removal from the car was improper or that he was illegally "arrested." However, the removal of respondent from the car was appropriate. ***Maryland v. Wilson***, 519 U.S. 408 (1997). In addition, the crack cocaine was not come at by exploitation of any illegal "arrest," since the "arrest" of respondent had no causal connection to the discovery of the crack cocaine. As a result, the crack cocaine cannot be suppressed as a "fruit" of the supposed "arrest." *See* ***Nix v. Williams***, 467 U.S. 431, 442 (1984); ***United States v. Sharpe***, 470 U.S. 675, 683 (1985); ***United States v. Eylicio-Montoya***, 70 F.3d 1158, 1166-67 (10th Cir. 1995); ***United States v. Bentley***, 29 F.3d 1073, 1075-76 (6th Cir. 1994), *cert. denied*, 513 U.S. 1028 (1994); ***State v. Graham***, 200 Conn. 9, 19-20, 509 A.2d 493, 499 (1986). In addition, respondent could not

"suppress" his body or this prosecution based on an illegal "arrest." ***INS v. Lopez-Mendoza***, 468 U.S. 1032, 1039, 1043 (1984).

Petitioner State of Ohio respectfully requests that this Court grant certiorari so that it may review the question presented for review.

CONCLUSION

The "automatic standing" doctrine "serves only to afford a windfall to defendants whose Fourth Amendment rights have *not* been violated." ***Salvucci***, 448 U.S. at 95 (emphasis *sic*). In its initial opinion, the Tenth District provided such a windfall to respondent Holt, by relying on the State's theory of prosecution as somehow supporting a finding that respondent held a legitimate expectation of privacy in the area searched.

When the Tenth District relied on the State's theory of prosecution as a proxy for standing, the Tenth District not only contradicted ordinary notions of "evidence," it also resurrected *sub rosa* the long-ago discarded "automatic standing" rule. This Court overruled the "automatic standing" rule in ***Salvucci***, but the Tenth District has resurrected that rule today, only this time under the guise of analyzing the "evidence." In its subsequent decision denying

reconsideration, the Tenth District exacerbated its error by placing the burden on the prosecution to prove the absence of a legitimate expectation of privacy. These conclusions deviated from the precedents of this Court.

The Tenth District either intentionally or negligently has failed to follow the precedents of this Court on the issue of whether respondent Holt has shown that he held a legitimate expectation of privacy in the area searched. Therefore, petitioner State of Ohio requests that this Court grant the petition for writ of certiorari, so that this Court can correct the Tenth District's mistaken or disobedient views on this federal question.

Respectfully submitted,

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APPENDIX A

PERTINENT QUOTATIONS OF SPECIFIC PORTIONS OF RECORD

Prior to the suppression hearing, the defense counsel complained about the failure of the police to take possession of the glove in which the crack cocaine had been found. (Tr. 7) The prosecutor responded by noting that the issue of the missing glove would "prove to be a nonissue" because of lack of standing:

> [T]he issue is going to be an issue * * * of standing, and I believe once the Court hears the evidence, the case -- preeminent case on standing is Rakas versus Illinois, United States Supreme Court case from 1978 or '79 which talks about the issue of standing, and the facts of that case go pretty close to this in that it deals specifically with a car, a passenger of a car, and items that are found in this car.

(Tr. 8-9) The common pleas court asked the prosecutor to provide a copy of the ***Rakas*** case. (Tr. 9)

After the common pleas court heard the testimony of Columbus Police Officers Rhodeback and

Smith, the court heard arguments. The prosecution again raised respondent's lack of standing to complain about the search:

> [B]efore we even get to the fourth amendment search and seizure issue, the first issue is standing; does a person have a right to contest a search of a vehicle. And in this particular situation, Lamont Holt has no right to contest the search. He did not own this car, and these items were not found on Lamont Holt, they were found inside the car. It's a standing issue, and for that reason, the defense motion to suppress the evidence should be overruled.

(Tr. 108) When the common pleas court indicated that it had read the ***Rakas*** case and found it "to be pretty on point," (Tr. 109), the defense counsel conceded the lack of standing to contest the search, but counsel contended that respondent had standing to contest his own seizure:

> [W]e are not -- and I will concede, and we've never tried to suggest otherwise -- this was not Lamont's car, and if what we were contesting was simply the search of the vehicle, then you're right -- or the prosecution's right, we would have no standing and we shouldn't be here on that issue, but that's not what we're contesting.

> We're contesting the seizure of Lamont. * * * [W]e're saying to the Court that the police had no right to seize him to arrest him * * *.

(Tr. 109) Defense counsel argued that the police lacked probable cause or reasonable suspicion to arrest respondent. (Tr. 109-110) Once the police removed respondent from the car, the police had no reason "to go any further" and search the car. (Tr. 112)

The prosecutor noted that the defense counsel's argument had "nothing to do with the seizure of the items themselves." (Tr. 113-114) The prosecutor thus reiterated his view that, under ***Rakas***, respondent had failed to show he held any legitimate expectation of privacy under the seat of the car. (Tr. 114) The defense counsel then reiterated his contention that:

> the whole issue here is their continued detention of Mr. Holt after they had done the things that were necessary to remove any threat from him.

(Tr. 114)

Finally, defense counsel contended that the improper "arrest" tainted everything that came afterward. (Tr. 116) In response, the prosecutor contended that the finding of the crack cocaine was not a "fruit of the poisonous tree" of the "arrest." (Tr. 116) After again noting that defendant "had no right to contest the finding of these drugs * * *," (Tr. 116), the prosecutor stated, as follows:

> [W]herever they put Mr. Holt has nothing to do with the finding of these drugs. He has no right to contest the finding of these drugs, and it's the finding[] of these drugs that gave rise to the arrest and subsequent prosecution in this case. The arrest itself does not cause the evidence to be held inadmissible.

(Tr. 117)

The common pleas court nevertheless sustained the motion to suppress:

> THE COURT: [I am sustaining the motion] [b]ecause I believe at this point the Defendant was under arrest, and I believe at that time the search went way -- way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that

> point. I think it went way beyond that. This gentleman, based upon the totality of evidence I heard from both these officers, I feel that the search was beyond -- was beyond the scope.
>
> MR. WODARCYK [the prosecutor]: Beyond the scope of what?
>
> THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.
>
> MR. WODARCYK: Your honor, is the Court stating, then, that the -- this evidence would then be suppressed under fruit of the poisonous tree?
>
> THE COURT: Exactly what I'm saying.

(Tr. 118-119) The common pleas court filed its formal entry sustaining the motion to suppress on April 22, 1997. *See* **Appendix H**.

Petitioner State of Ohio timely appealed and raised two assignments of error. Under the first assignment of error, the State made three contentions: first, respondent lacked standing to complain about the search; second, the search was lawful under ***Michigan v. Long***, 463 U.S. 1032

(1983); and, third, respondent had been lawfully detained under ***Terry v. Ohio***, 392 U.S. 1 (1968). State's Corrected Brief, at 8-18. In the second assignment of error, the State argued that respondent could not suppress the cocaine because of an illegal "arrest," since the cocaine was not a fruit of that "arrest." State's Corrected Brief, at 19-24.

Insofar as the lack of standing was concerned, petitioner State of Ohio argued the following:

> Defendant lacked standing to complain about the search of the passenger compartment of the car, since he had not been driving the car and since he had no possessory interest in the car. In ***Rakas v. Illinois*** (1978), 439 U.S. 128, the United States Supreme Court determined that a mere passenger in an automobile has no legitimate expectation of privacy in the automobile and thus that the passenger cannot complain about a search of that automobile. See, also, ***State v. Gaines*** (May 29, 1997), Franklin App. No. 96APA09-1230, unreported (1997 Opinions 1961, 1963-64) (Attached, A-3). Even when the automobile contains property owned by the passenger, the passenger lacks standing to complain about a search of the automobile. See ***Rawlings v. Kentucky*** (1980), 448 U.S. 98, 105-106 (defendant had no standing to complain about search of girlfriend's

> purse, even though he confessed ownership of the drugs contained therein). Under ***Rakas***, a passenger cannot complain about a search under the front passenger seat of someone else's car. ***Rakas***, 439 U.S. at 148-49 (such areas "are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.").
>
> In the present case, defendant was a mere passenger in the car. The defense fell well short of meeting its burden of proving that defendant had some reasonable expectation of privacy in the area searched. ***State v. Gaines***, ***supra***. The defense conceded this point. As a result, the search itself could not provide a basis for suppression of the crack cocaine. To the extent the trial court appeared to indicate otherwise, the trial court erred.

State's Corrected Brief, at 9-10.

In a judgment and opinion rendered on October 30, 1997, the Ohio Court of Appeals, Tenth Appellate District, affirmed the order of suppression. The Tenth District concluded that the search of the glove had been unlawful. Opinion, at 12-13. In addressing the question of standing, the Tenth District noted the State's contention that respondent lacked standing to complain about

the search of the glove. Opinion, at 11. The Tenth District then noted that respondent had "the burden of demonstrate that he * * * ha[d] a reasonable expectation of privacy in the area searched." Opinion, at 11. The Tenth District then stated, as follows:

> As indicated above in our discussion of the facts of this case, no direct evidence was introduced regarding ownership of the glove itself. However, the state's entire theory upon which it bases its prosecution is that the glove, or at least the contents thereof, belonged to Mr. Holt. Further, police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the glove from his pocket prior to depositing it on the floor under the seat in front of him. Therefore, we find that he does have standing to challenge the search of the glove.

Opinion, at 12.

Petitioner State of Ohio filed a motion for reconsideration, contending that the Tenth District's focus of the prosecution's theory of the case was improper in light of this Court's overruling of the "automatic standing" rule in ***United States v. Salvucci***, 448 U.S. 83 (1980). *See* State's

Motion for Reconsideration, at 3-5. Based on ***Rawlings v. Kentucky***, 448 U.S. 98 (1980), the State of Ohio also contended that reliance on the police officers' observations was insufficient to show standing, since the officers' observations showed a precipitous bailment inconsistent with having a legitimate expectation of privacy in the area under the front passenger seat. *See* State's Motion for Reconsideration, at 7-11.

In a journal entry and memorandum decision filed on December 9, 1997, the Tenth District denied the motion for reconsideration. In doing so, the Tenth District contended that *the prosecution* had the burden of proving the absence of standing. The Tenth District stated, as follows:

> No evidence was presented which indicated that the glove was not his. No warrants of any kind were involved in the case. The state of Ohio did not demonstrate any lack of standing either in the trial court or on appeal. Given the absence of any warrants, the state of Ohio had the duty to go forward with evidence of a lack of standing for Lamont Holt if the state wished to avoid the

consequences of the illegal search conducted.

Memorandum Decision, at 1-2.

Petitioner State of Ohio thereafter filed a timely discretionary appeal in the Ohio Supreme Court. The State again relied on ***Rakas***, ***Salvucci***, and ***Rawlings***, contending, *inter alia*, that the Tenth District had erred in concluding that the prosecution's theory of the case could satisfy the respondent's burden of proof, and that the Tenth District had also erred in its decision denying reconsideration by placing the burden of proof on the prosecution to prove lack of standing. *See* State's Memorandum in Support of Jurisdiction, at 9-12, 13-14. The State of Ohio raised the following proposition of law:

> THE EXCLUSIONARY RULE IS DESIGNED ONLY TO PROTECT THE *PERSONAL* RIGHTS OF A CRIMINAL DEFENDANT. THEREFORE, WHEN A DEFENDANT CHALLENGES A SEARCH OR SEIZURE LEADING TO THE DISCOVERY OF CONTRABAND, HE BEARS THE BURDEN OF PROVING HE PERSONALLY HELD A LEGITIMATE EXPECTATION OF

> PRIVACY IN THE AREA SEARCHED. CONSTRUCTIVE POSSESSION OR OWNERSHIP OF THE CONTRABAND AT THE TIME OF THE CHALLENGED SEARCH IS INSUFFICIENT TO MEET THIS BURDEN OF PROOF. THE "AUTOMATIC STANDING" RULE IS REJECTED.

See State's Memorandum in Support of Jurisdiction, at 8. With two justices dissenting, the Ohio Supreme Court declined discretionary review on February 25, 1998. ***State v. Holt***, 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998).

APPENDIX B

THE SUPREME COURT OF OHIO

State of Ohio, [filed Feb. 25, 1998]

Appellant, 1998 TERM

v. Case No. 97-2581

Lamont L. Holt, ENTRY

Appellee.

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Ron O'Brien

(Franklin County Court of Appeals; No. 97APA04550)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, [filed Oct. 30, 1997]

Plaintiff-Appellant,

v. No. 97APA04-550

(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on October 30, 1997, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX D

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellant,

v. No. 97APA04-550

(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

O P I N I O N

Rendered on October 30, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

H. Tim Merkle, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

On February 29, 1997, Lamont L. Holt was indicted by a Franklin County grand jury on a single count of possession of cocaine, in violation of R.C. 2925.11, a felony of the second degree. The charge resulted from a routine traffic stop of a car in which Mr. Holt was a passenger. The pertinent factual details are set forth below in our discussion of the assignments of error.

On March 17, 1997, defense counsel filed a motion seeking suppression as evidence the cocaine and any other items unlawfully searched and/or seized as fruits of an "illegal and warrantless seizure of the defendant." Following a hearing which commenced on April 15, 1997, the trial court sustained the motion to suppress.

The state of Ohio timely filed its notice of appeal, pursuant to R.C. 2945.67, Crim.R. 12(J), and App.R. 4(B)(4). The state sets forth two assignments of error for our

consideration:

"FIRST ASSIGNMENT OF ERROR

"THE TRIAL [COURT] ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN NO ILLEGAL SEARCH OR SEIZURE OCCURRED.

"SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN THE CRACK COCAINE WAS NOT COME AT BY EXPLOITATION OF THE ILLEGAL 'ARREST.'"

Because the assignments of error are interrelated, we address them jointly.

The trial court's ruling was based upon the following evidence adduced at the hearing on the motion to suppress.

The first witness called to testify on behalf of the state was Todd S. Rhodeback, who had been employed as a Columbus police officer for approximately two and one-half years at the time. On the date of the incident,

Officer Rhodeback was working third shift, 10:00 p.m. to 6:00 a.m. (Tr. 19-21.)

At approximately 1:15 a.m. on February 10, 1997, Officer Rhodeback was "running the radar" and clocked a vehicle travelling 48 in a 35 miles-per-hour zone. Another officer, Clint Smith, was also there in his own cruiser. Officer Rhodeback pulled up behind the vehicle to initiate a traffic stop. Officer Smith also followed in his cruiser and stopped his cruiser behind Rhodeback's. The driver of the private vehicle promptly pulled over and was "cooperative." (Tr. 22-26.) Soon thereafter, a third cruiser stopped as well.

Officer Rhodeback observed three persons in the vehicle: the driver, a passenger in the front, and a passenger in the back seat. Officer Rhodeback observed the person seated in the back "*** moving around. As I was getting out of the cruiser, he was dipping his torso forward

as if to be hiding something." The officer conceded that from his vantage point in his cruiser behind the car, he could only see this person from "shoulders up." According to the officer, the "bending forward" motion of the back seat passenger "most definitely" gave him cause for concern for his personal safety. In particular, he noted that there might have been a weapon in the back seat. (Tr. 27-31.)

After Officer Rhodeback informed Officer Smith of his safety concerns, Smith removed Mr. Holt, the back seat passenger, from the car. Smith then patted him down to check for weapons and put him in a cruiser. No weapons were found. (Tr. 32-34.)

At some point, the driver and remaining passenger were also taken out of the car and placed in separate cruisers. With respect to finding a glove in the vehicle, Officer Rhodeback testified as follows:

> "A. If I recall, that's when we -- when I go in the back to find -- to look under the seat to where the

alleged area the person was hiding something, look under the [front passenger] seat and find a white *** knit glove, felt it had something inside it, then when it's -- when I looked inside and find what appears to be crack cocaine in the baggy." (Tr. 34.)

Officer Rhodeback clarified that the cocaine was found in the "main part of the glove," in the "middle," as opposed to the finger holes. (Tr. 39-40.) On cross-examination, the officer provided further details with respect to his observations regarding the glove:

"[Defense counsel] Q. Okay. So you knew the glove wasn't a weapon?

"[Officer Rhodeback] A. No. The glove itself, yes, I knew wasn't a weapon.

"Q. What about the way that it appeared to you made you think that it was a threat to you?

"A. The way that that appeared to me there is something inside.

"Q. Okay.

"A. *The content of which I have no idea.* That's why I checked and saw what was in there.

"Q. You didn't feel it or anything to try to figure

out what was inside?

"A. Pulled it out and looked, shined the flashlight in.

"Q. Well, did you suspect that what was inside of it was a gun?

"A. *No.*

"Q. Did you suspect that what was inside of it was a knife?

"A. *To be honest, I didn't suspect what was in it, that's why I looked.*" (Tr. 75-76; emphasis added.)

An officer conducted a field test of the substance, which tested positive for cocaine. (Tr. 39-40.) Soon thereafter, Mr. Holt was placed under arrest.[1]

Officer Rhodeback testified that he left the glove in the vehicle instead of turning it over to the property room along with the cocaine. When asked why he decided to leave the glove in the car, he responded, "Well, to me [it]

---

[1] According to the record, the driver of the car was issued a citation for speeding and the other passenger was arrested based upon outstanding warrants.

was not considered evidence. It wasn't -- I don't know, it just wasn't part of the crime in my opinion." (Tr. 46.)

On cross-examination, Officer Rhodeback clarified that, as he pulled in behind the vehicle which had promptly pulled over, he was adjusting the cruiser's spotlight. At that time, all he saw to arouse his suspicion was Mr. Holt's upper body movement, primarily his shoulders. Soon thereafter, when the officer approached the vehicle, he saw the back seat passenger "bend forward." The officer conceded that he was not able to see Mr. Holt's arms or hands; all he saw was a "forward movement." (Tr. 57-58.)

According to Officer Rhodeback, Mr. Holt told the officer that "they weren't his drugs." Mr. Holt made no other statement. (Tr. 82.) On redirect examination, the officer again clarified that the glove was "more in the reach of the person in the rear." (Tr. 85.)

Significantly, the record does not indicate that any questions were asked at any time regarding ownership of the glove itself.

Officer Clinton A. Smith testified that he had been a patrol officer for almost three years. He was in a separate cruiser "doing speed patrol" at the same location and time Officer Rhodeback was patrolling. When Rhodeback followed and pulled over the vehicle, Smith followed and parked his cruiser behind Rhodeback's. (Tr. 88-89.) Officer Smith's testimony regarding the traffic stop includes the following:

> "A. As I approached the car from the passenger side, I came up on the passenger side and Officer Rhodeback stated,[']did you see him moving?['] At which time - well, prior to that I observed the rear passenger making some gesture forward and making some motions that appeared to me that he was attempting to hide or do something of an inappropriate nature." (Tr. 89.)

He later described the "gesture" as "making a bending movement at the mid torso, *** a reaching down and a

movement of that nature." (Tr. 91.) Officer Smith further explained:

> "I could not see his actual hands or anything of that nature, but it was clear that he was leaning forward and extending himself out toward the front seat." (Tr. 93.)

Officer Smith then asked Mr. Holt to exit the vehicle, and Mr. Holt cooperated. Smith patted him down and placed him in the back seat of his cruiser. Another patrolman, Officer Wood, soon arrived on the scene and assisted Officer Rhodeback in ordering the others to exit the vehicle. (Tr. 95-96.) On cross-examination, Officer Smith conceded that the "leaning forward" motion was consistent with the rear passenger speaking to those in the front seat.

On cross-examination, Officer Smith explained why he believes that "leaning forward" is a sufficient reason to take someone out of a car:

> "A. Well, in the particular area of town we work it's very common to find narcotics or firearms, and when an individual moves in a manner which you're

> unable to see what they're doing and it's clear -- not actually clear, but they may be attempting to hide something, we normally remove him from the car." (Tr. 99.)

Smith conceded that it is not "typical" for three cruisers to respond to a lone vehicle allegedly travelling faster than the posted speed limit. (Tr. 100.)

Defense counsel noting that there were three male black occupants in the car, Officer Smith responded that part of the reason he decided to "assist" was because there were "three individuals." When asked by defense counsel if the officer would have decided to "assist" if the occupants were a man, a woman and a child, the officer responded, "probably not." However, if it had been three women, he "probably would have just for officer safety reasons." (Tr. 101-102.)

Following brief arguments of counsel, the trial court promptly sustained Mr. Holt's motion to suppress. The trial court stated the following as its rationale:

"THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way -- way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that. This gentleman [*sic*], based upon the totality of evidence I heard from both these officers, I feel that the search was beyond -- was beyond the scope.

"[PROSECUTION]: Beyond the scope of what?

"THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

"[PROSECUTION]: Your Honor, is the Court stating, then, that the -- this evidence would then be suppressed under fruit of the poisonous tree?

"THE COURT: Exactly what I'm saying." (Tr. 118-119.)

While the trial court's rationale in suppressing the evidence is not a model of clarity, the court apparently concluded that the actions of law enforcement personnel in their various searches and seizures which occurred here were unreasonable and improper based upon the "totality of the

circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177. In *Bobo*, the Supreme Court of Ohio held, at paragraph two of the syllabus, as follows:

> "Where a police officer, during an investigative stop, has a *reasonable suspicion that an individual is armed based on the totality of the circumstances*, the officer may initiate a protective search for the safety of himself and others." (Emphasis added.)

Neither party contends that the initial traffic stop was unlawful nor otherwise impermissible. Similarly, since Mr. Holt claims no ownership interest in the car, no argument is made that he has standing to challenge the arguably questionable search of the car. Thus, our analysis proceeds first to the warrantless search and seizure of Mr. Holt himself.

Preliminarily, as a threshold issue, we note a significant case rendered recently by the Supreme Court of the United States which compels us to find initially that appellant has no Fourth Amendment complaint as to his

being ordered out of the car in the first place. In *Maryland v. Wilson* (1997), 519 U.S. ___, 117 S. Ct. 882, the Supreme Court held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. The *Wilson* case expressly expanded the scope of *Pennsylvania v. Mimms* (1977), 434 U.S. 106, wherein the Court ruled that an officer may, as a matter of course, order the *driver* of a lawfully stopped car to exit the vehicle. In essence, the ultimate conclusion of both *Wilson* and *Mimms* was that considerations of "officer safety" outweigh the intrusion into a "*** driver's [or passenger's] liberty occasioned by the officer's ordering him out of the car." *Wilson* at 885. Thus, under the federal Constitution, appellant clearly cannot complain about being asked to get out of the car.

The Supreme Court of Ohio has followed and applied the *Mimms* rule which "merely dispenses with the

requirement that the police officer possess reasonable suspicion of criminal activity before the officer may order the *driver* out of an already lawfully stopped vehicle." (Emphasis added.) *State v. Evans* (1993), 67 Ohio St.3d 405, 408. As noted by the *Evans* court, a "*Mimms* order does not have to be justified by any constitutional quantum of suspicion." *Id.*

We note that other Ohio appellate courts have recently relied upon *Wilson* to sanction law enforcement orders requiring all occupants to exit a lawfully stopped vehicle. See, *e.g.*, *State v. Birchfield* (Aug. 26, 1997), Ross App. No. 97CA2281, unreported (Fourth Appellate District); *State v. Fellows* (May 22, 1997), Cuyahoga App. No. 70900, unreported (Eighth Appellate District); *State v. Hamilton* (Aug. 1, 1997), Montgomery App. No. 16124, unreported, and *State v. Ross* (Aug. 29, 1997), Montgomery App. No. 16135, unreported (Second Appellate District).

Assuming, *arguendo*, that no state constitutional right was violated by law enforcement officials in ordering all occupants out of the car, we proceed in our analysis to the search and seizure of Mr. Holt's person.

With respect to the propriety of the "pat-down" search of Mr. Holt, we first look to *Terry v. Ohio* (1968), 392 U.S. 1. As construed by the Supreme Court of Ohio, the United States Supreme Court's holding in *Terry* allows law enforcement to conduct a "limited protective search of the detainee's person for concealed weapons" only when justified by an officer's reasonable conclusion that "'the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others ***.'" *Evans*, *supra* at 408, citing *Terry* at 24. In justifying that conclusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."

Id. at 21. The circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Freeman* (1980), 64 Ohio St.2d 291, 295. Thus, the standard for reviewing such police conduct is an objective one. *Terry, supra*, 392 U.S. at 21-22; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

Given the state of the record before us and the *Terry* progeny bestowing increasing degrees of deference to an officer's professed objectives for conducting "protective" frisks, we cannot say that the pat-down search of Mr. Holt was unconstitutionally impermissible.

Finally, we now turn to that issue which we deem dispositive of this appeal: whether the defendant has standing to complain about the search of the glove itself, about which search the prosecution urges us to find that Mr. Holt lacks standing to complain.

Suppression of the fruit of a Fourth Amendment violation can be urged only by those whose rights were violated by the search itself. Standing is not achieved solely by a person's status as defendant nor by introduction of damaging evidence. *Alderman v. United States* (1969), 394 U.S. 165. Therefore, before a court may review the reasonableness of police behavior, the defendant must demonstrate that his Fourth Amendment right to privacy was violated. "Fourth Amendment rights are personal rights which *** may not be vicariously asserted." *Rakas v. Illinois* (1978), 439 U.S. 128, 133-134. To establish that his own Fourth Amendment rights have been violated by an illegal search and seizure, a defendant has the burden to demonstrate that he or she has a reasonable expectation of privacy in the area searched. *Id.*

As indicated above in our discussion of the facts of this case, no direct evidence was introduced

regarding ownership of the glove itself. However, the state's entire theory upon which it bases its prosecution is that the glove, or at least the contents thereof, belonged to Mr. Holt. Further, police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the glove from his pocket prior to depositing it on the floor under the seat in front of him. Therefore, we find that he does have standing to challenge the search of the glove.

In *State v. Brown* (1992), 63 Ohio St.3d 349, the issue presented was whether the warrantless search of the defendant's automobile was justified under the line of cases that permits an officer to conduct a warrantless search incident to a lawful custodial arrest "*in order to protect himself from any accessible weapons.*" *Id.* at 350. The Supreme Court of Ohio held, at the syllabus:

> "A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer

> has the suspect -- and sole occupant of the vehicle -- under control in the police cruiser. (*New York v. Belton* [1981], 453 U.S. 454, ***, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)"

We believe the same rationale applies here. Based upon the foregoing case law and the evidence delineated above, the police officer had no right to search the glove. According to testimony adduced at the hearing, when the officer picked up the glove, innocuous in and of itself, it became readily apparent that it did not contain a weapon. There was simply no evidence to suggest what the glove's contents, if any, *appeared* to be. By the officer's own admission, he had no idea what might be contained in the glove. He could not and did not contend that he felt "threatened" in any way by the glove or its contents. Pursuant to the rule and rationale of *Brown*, the right to search the glove stopped once the officer was aware no weapons were present. Any ensuing searches and seizures

were unlawful.

As a result, the assignments of error are overruled.

Having overruled the assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

CLOSE and PETREE, JJ., concur.

APPENDIX E

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, [filed Dec. 9, 1997]

Plaintiff-Appellant,

v. No. 97APA04-550

(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on December 9, 1997, it is the order of this court that the application for reconsideration is denied.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX F

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellant,

v. No. 97APA04-550

(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

MEMORANDUM DECISION

Rendered on December 9, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

H. Tim Merkle, for appellee.

ON APPLICATION FOR RECONSIDERATION

TYACK, P.J.

This cause is before the court as the result of the filing of a document entitled "motion for reconsideration" on behalf of the state of Ohio.

The evidence presented at the hearing on the motion to suppress indicated that the glove in question was on the floor under the seat in front of Lamont Holt when the vehicle in which he was riding was pulled over. No evidence was presented which indicated that the glove was not his. No warrants of any kind were involved in the case. The state of Ohio did not demonstrate any lack of standing either in the trial court or on appeal. Given the absence of any warrants, the state of Ohio had the duty to go forward with evidence of a lack of standing for Lamont Holt if the state wished to avoid the consequences of the illegal search conducted.

Treated as an application for reconsideration, pursuant to App.R. 26(A), the "motion" is denied.

Application denied.

CLOSE and PETREE, JJ., concur.

APPENDIX G

IN THE COURT OF COMMON PLEAS

FRANKLIN COUNTY

CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

vs. Case No. 97CR-02-882

LAMONT HOLT,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before Honorable Judge David Fais

* * *

[Transcript pages 118 and 119 -- April 15, 1997]

THE COURT: * * * Motion is sustained. Motion is sustained.

MR. MERKLE [defense counsel]: Thank you, Your Honor.

MR. WODARCYK [prosecutor]: Your Honor, may the Court make a record of its reasons for the sustaining of the motion?

THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way -- way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that point. I think it went way beyond that. This gentleman, based upon the totality of evidence I heard from both these officers, I feel that the search was beyond -- was beyond the scope.

MR. WODARCYK: Beyond the scope of what?

THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

MR. WODARCYK: Your honor, is the Court stating, then, that the -- this evidence would then be suppressed under fruit of the poisonous tree?

THE COURT: Exactly what I'm saying.

* * *

APPENDIX H

IN THE COURT OF COMMON PLEAS,

FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

State of Ohio, [filed Apr. 22, 1997]

Plaintiff,

vs. Case No. 97CR-02-882

Lamont Holt, Judge Fais

Defendant.

ENTRY

For the reasons stated on the record on April 15, 1997, the Court hereby SUSTAINS the motion to suppress filed by defendant.

/s/ Fais 4-22-97
Judge David W. Fais
Franklin County Court of
Common Pleas

APPROVED:

/s/ Steven L. Taylor (as to form only)
STEVEN L. TAYLOR (0043876)
Assistant Prosecuting Attorney

/s/ H. Tim Merkle (by SLT per phone authority)
H. TIM MERKLE (0023458)
Counsel for Defendant

Supreme Court, U.S.
FILED
JUN 17 1998
OFFICE OF THE CLERK

No. 97-1853

In The
Supreme Court of The United States
October Term 1997

STATE OF OHIO,
Petitioner,

v.

LAMONT L. HOLT,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Tenth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
With Appendix

Judith Stevenson
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QUESTIONS PRESENTED FOR REVIEW

1. This Court is vested with jurisdiction to review a final judgment of a state court that presents a substantial constitutional question, but lacks jurisdiction to review judgments based upon independent, adequate state grounds. The judgment of the Ohio Court of Appeals challenged by Petitioner is based upon a decision of the Ohio Supreme Court that expressly applied Ohio constitutional law to prohibit warrantless searches of items seized from vehicles. Does this Court have jurisdiction to review this judgment?

2. A criminal defendant seeking suppression of items seized in a warrantless search must demonstrate the existence of a legitimate expectation of privacy in the

searched area. Testimony in the suppression hearing in the trial court indicated that Respondent possessed the searched item in his pocket immediately before the vehicle in which he rode was stopped by police. Does the fact-based ruling that Respondent had standing to challenge the search of this item warrant review by this Court?

LIST OF PARTIES

The Petitioner in this case is the State of Ohio. Lamont L. Holt is the Respondent. The case involves no other parties.

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No. 97-1853

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,
Petitioner

-vs-

LAMONT L. HOLT,
Respondent.

On Petition for Writ of Certiorari to
the Ohio Court of Appeals, Tenth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Order of the Franklin County Court of Common Pleas which sustained Respondent's motion to suppress is

not reported, but is attached to this Brief as **Appendix G.** The Opinion of the Court of Appeals of Ohio, Tenth Appellate District, is also unreported, but is attached as **Appendix C**. The Order of the Ohio Supreme Court denying discretionary review is reported at 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998), and is also attached as **Appendix A**.

JURISDICTIONAL STATEMENT

Petitioner claims jurisdiction pursuant to 28 U.S.C. §1257. This section vests this Court with jurisdiction to review a final judgment of a state court that presents a substantial federal question. Jurisdiction does not extend to review of

state court judgments based upon independent and adequate state grounds, however.[1]

Review of the challenged Opinion of the Court of Appeals reveals that the Court premised its ruling largely upon a prior opinion of the Ohio Supreme Court[2] that was expressly based upon a provision of the Ohio Constitution[3] that governs police searches and seizures.

Respondent submits that the judgment at issue is based upon independent and adequate state grounds. This

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[1] See *Zacchini v. Scripps-Howard Broadcasting Co.* , 433 U.S. 562, 566 (1977); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

[2] *State v. Brown*, 63 Ohio St.3d 349, 588 N.E.2d 113, cert. denied, 506 U.S. 862 (1992).

[3] §14, Article I, Ohio Constitution.

Honorable Court therefore lacks jurisdiction to review this judgment.

Respondent addresses this issue in detail in the Argument below.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, *inter alia*:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * *

§14, Article I of the Ohio Constitution states:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

STATEMENT OF THE CASE

Respondent Lamont Holt was charged with possession of crack cocaine in violation of Ohio statutes. The charge arose from the routine traffic stop of an automobile in which Respondent was a passenger. Prior to trial, Respondent moved to suppress evidence of the

cocaine as fruits of an illegal and warrantless search in violation of his constitutional rights.

During a hearing on the suppression motion, Columbus, Ohio police officer Todd S. Rhodeback testified that he stopped an automobile for speeding in the early morning hours of February 10, 1997.[4] Rhodeback saw three people in the vehicle: the driver, a front seat passenger, and a single rear seat passenger. He saw the person in the rear moving around, and dipping his torso forward as if to be hiding something. He stated that he could only see this person from the shoulders up, but that the forward motion of the person gave him concern for his own safety. Rhodeback stated that Respondent was

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[4] The evidence adduced in the suppression hearing is well summarized in the opinion of the Court of Appeals, attached as Appendix C.

fidgeting around, and appeared to be digging into his pockets.

After the stop, a second officer, Clinton Smith, removed Respondent from the car, and patted him down to check for weapons. Finding none, he placed Respondent in the rear of a cruiser.

After police removed the other occupants of the vehicle and placed them in separate cruisers, Rhodeback returned to the cruiser to look under the seat. He found a white knit glove, felt it had something inside it, then looked inside and found what appeared to be crack cocaine in the baggy Rhodeback conceded that the glove itself was not a weapon or threat to him, and that prior to searching the glove, he had no idea what its contents were.

The trial court sustained the motion to suppress. Petitioner appealed to the Ohio Court of Appeals, Tenth Appellate District. By Opinion and Judgment Entry rendered October 30, 1997, the court affirmed the trial court. The court denied Petitioner's subsequent motion for reconsideration on December 9, 1997.

Petitioner appealed to the Ohio Supreme Court. By Entry filed February 25, 1998, the Supreme Court denied review.[5]

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[5] *State v. Holt*, 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998).

SUMMARY OF ARGUMENT

The petition of the State of Ohio should be rejected for two independent reasons. First, Petitioner challenges the judgment of the Court of Appeals of Ohio, Tenth Appellate District, and claims that the court erred in its application of federal constitutional law. But the opinion of the Court of Appeals based its decision almost exclusively on a decision of the Ohio Supreme Court that was based on *state* constitutional law. Thus, the judgment in question is based upon independent, adequate state grounds. This Court lacks jurisdiction over the case.

Second, review of the challenged opinion reveals that the state court correctly referred to decisions of this Court on the issue of an accused's standing to assert a Fourth Amendment violation. Petitioner's argument is little

more than a disagreement with the factual conclusions reached in the state courts. The case, then, does not present a constitutional issue of sufficient magnitude to warrant this Court to exercise its jurisdiction.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION TO REVIEW A STATE COURT JUDGMENT BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

In its Opinion, the Court of Appeals relied heavily on the prior opinion of the Ohio Supreme Court in *State v. Brown*:

In *State v. Brown* (1992), 63 Ohio St. 3d 349, 588 N.E.2d 113, the issue presented was whether the warrantless search of the defendant's automobile was justified under the line of cases that permits an officer to conduct a warrantless search incident to a lawful custodial arrest " in order to protect himself from any accessible weapons." *Id.* at 350. The Supreme Court of Ohio held, at the syllabus:

"A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect -- and sole occupant of the vehicle -- under control in the police cruiser. (*New York v.*

Belton [1981], 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 ***, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)"

We believe the same rationale applies here. Based upon the foregoing case law and the evidence delineated above, the police officer had no right to search the glove. According to testimony adduced at the hearing, when the officer picked up the glove, innocuous in and of itself, it became readily apparent that it did not contain a weapon. There was simply no evidence to suggest what the glove's contents, if any, appeared to be. By the officer's own admission, he had no idea what might be contained in the glove.

> He could not and did not contend that he felt "threatened" in any way by the glove or its contents. Pursuant to the rule and rationale of *Brown*, the right to search the glove stopped once the officer was aware no weapons were present. Any ensuing searches and seizures were unlawful.

(Emphasis added.)

This analysis was a correct application of *State v. Brown*, and a proper construction of Ohio Constitutional law. *Brown* presented the question of whether a warrantless search of closed containers found in a vehicle could occur once the occupant had been arrested and secured in a police cruiser. The State contended that the search was authorized

by prior rulings of this Court governing searches incident to arrest.[6]

Significantly, the Ohio Supreme Court expressly declined to follow this Court's prior ruling in *New York v. Belton*:

> "If *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile solely because he has arrested one of its occupants, on any charge, we decline to adopt its rule."

In so stating, the Court expressly relied upon the Ohio Constitution and noted that greater rights may be

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[6] *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California* , 395 U.S. 752 (1969).

afforded by the constitutions of individual states than under the federal Constitution.[7]

§14, Article I of the Ohio Constitution, as construed in *State v. Brown*, serves as a state ground that is both independent and adequate. The decision of the trial court is fully supportable on this state ground even if, *arguendo*, the court erred in its application of federal law. Review, then, would constitute little more than an advisory opinion on any

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[7] *State v. Brown* at fn. 3, citing *California v. Greenwood* , 486 U.S. 35, 43 (1988): "Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."

federal question. This Court should therefore decline jurisdiction.[8]

II.

A DEFENDANT SEEKING SUPPRESSION OF THE PRODUCT OF A WARRANTLESS SEARCH MAY ESTABLISH STANDING WITHOUT PERSONALLY TESTIFYING TO A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

The proposition that a criminal defendant seeking suppression must have a legitimate expectation of privacy in the area searched is long-settled.[9] Petitioner seemingly urges the Court to extend this rule to require a defendant to

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[8] *Herb v. Pitcarin*, 324 U.S. 117, 125 (1945).

[9] *Rakas v. Illinois*, 439 U.S. 128 (1978).

testify as to this expectation of privacy in order to establish standing.

The risks that this unwarranted modification of law would pose to criminal defendants are patent. While it is clear that statements made by an accused during a suppression hearing are not admissible in the prosecution's case in chief[10], this Court has never held that such statements may not be used during cross-examination of the accused, or in sentencing. Nothing in current law requires an accused seeking suppression to submit to such risks.

[10] *Simmons v. United States*, 390 U.S. 377. (1968).

Consistent with Ohio law governing suppression proceedings involving warrantless searches,[11] the Petitioner bore the burden of establishing that the search fit a recognized exception to the warrant requirement. *The state's own evidence* suggested if not established that Respondent possessed the glove. The Court of Appeals correctly found that "police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the glove from his pocket prior to depositing it on the floor under the seat in front of him."

It is in this respect that this case and *Rakas v. Illinois* differ strikingly. *Rakas* involved an effort by vehicle

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[11] *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988); *City of Athens v. Wolf*, 38 Ohio St.2d 237, 313 N.E.2d 405 (1974).

passengers to suppress evidence--a box of rifle shells and a sawed-off shotgun used in a robbery. *No evidence* showed that the passengers owned either the items or the vehicle.

The holding of the Court of Appeals below represents a correct interpretation of facts and application of the *Rakas* rule. Petitioner has simply not demonstrated error--or a compelling need for this Court to revisit and modify settled law.

CONCLUSION

The admonition and observation set forth in this Court's Rules are clear: a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.[12] In the final analysis, Petitioner's claim is

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[12] Rule 10, Supreme Court Rules of Practice.

simply that the Court of Appeals either erred in its factual findings or misapplied the settled rule of *Rakas v. Illinois*. Petitioner, then, has failed to set forth the existence of a federal constitutional question, or a compelling reason why this Court should exercise jurisdiction here. Accordingly, this Court should deny certiorari and decline review of the Court of Appeals.

Respectfully submitted,

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Franklin County Public Defender

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614-462-3194

Counsel for Respondent

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APPENDIX A

UNITED STATES SUPREME COURT OF OHIO

JUDGEMENT ENTRY

Tenth Circuit Case Nº. 97-1853
Filed February 25, 1998

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APPENDIX A

THE SUPREME COURT OF OHIO

State of Ohio,
Appellant,

[filed Feb. 25, 1998]
1998 TERM

v.

Case No. 97-2581

Lamont L. Holt,
Appellee.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:
Docket Fee, $40.00, paid by Ron O'Brien
(Franklin County Court of Appeals; No. 97APA04550)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOURNAL ENTRY

Tenth Circuit Case Nº. 97-1853
Filed October 30, 1997

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APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

[filed Oct. 30, 1997]

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on October 30, 1997, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OPINION

Tenth Circuit Case Nº. 97-1853
Filed October 30, 1997

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APPENDIX C

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

OPINION

Rendered on October 30, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellant.

H. Tim Merkle, for appellee.

APPEAL from the Franklin Cnty Court of Common Pleas

TYACK, P.J.

On February 29, 1997, Lamont L. Holt was indicted by a Franklin County grand jury on a single count of possession of cocaine, in violation of R.C. 2925.11, a felony of the second degree. The charge resulted from a routine traffic stop of a car in which Mr. Holt was a passenger. The pertinent factual details are set forth below in our discussion of the assignments of error.

On March 17, 1997, defense counsel filed a motion seeking suppression as evidence the cocaine and any other items unlawfully searched and/or seized as fruits of an "illegal and warrantless seizure of the defendant." Following a hearing which commenced on April 15, 1997, the trial court sustained the motion to suppress.

The state of Ohio timely filed its notice of appeal, pursuant to R.C.2945.67, Crim.R. 12(J), and App.R. 4(B)(4). The state sets forth two assignments of error for our consideration:

"FIRST ASSIGNMENT OF ERROR

"THE TRIAL [COURT] ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN NO ILLEGAL SEARCH OR SEIZURE OCCURRED.

"SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN THE CRACK COCAINE WAS NOT COME AT BY EXPLOITATION OF THE ILLEGAL 'ARREST.'"

Because the assignments of error are interrelated, we address them jointly.

The trial court's ruling was based upon the following evidence adduced at the hearing on the motion to suppress.

The first witness called to testify on behalf of the state was Todd S. Rhodeback, who had been employed as a Columbus police officer for approximately two and one-half years at the time. On the date of the incident, Officer Rhodeback was working third shift, 10:00 p.m. to 6:00 a.m. (Tr. 19-21.)

At approximately 1:15 a.m. on February 10, 1997, Officer Rhodeback was "running the radar" and clocked a vehicle travelling 48 in a 35 miles-per-hour zone. Another officer, Clint Smith, was also there in his own cruiser. Officer Rhodeback pulled up behind the vehicle to initiate a traffic stop. Officer Smith also followed in his cruiser and stopped his cruiser behind Rhodeback's. The driver of the private vehicle promptly pulled over and was "cooperative." (Tr. 22-26.) Soon thereafter, a third cruiser stopped as well.

Officer Rhodeback observed three persons in the vehicle: the driver, a passenger in the front, and a passenger in the back seat. Officer Rhodeback observed the person seated in the back "*** moving around. As I was getting out of the cruiser, he was dipping his torso forward as if to be hiding something." The officer conceded that from his vantage point in his cruiser behind the car, he could only see this person from "shoulders up." According to the officer, the "bending forward" motion of the back seat passenger "most definitely" gave him cause for concern for his personal safety. In particular, he noted that there might have been a weapon in the back seat. (Tr. 27-31.)

After Officer Rhodeback informed Officer Smith of his safety concerns, Smith removed Mr. Holt, the back seat passenger, from the car. Smith then patted him down to check for weapons and put him in a cruiser. No weapons were found. (Tr. 32-34.)

At some point, the driver and remaining passenger were also taken out of the car and placed in separate cruisers. With respect to finding a glove in the vehicle, Officer Rhodeback testified as follows:

> "A. If I recall, that's when we -- when I go in the back to find -- to look under the seat to where the alleged area the person was hiding something, look under the [front passenger] seat and find a white *** knit glove, felt it had something inside it, then

when it's -- when I looked inside and find what appears to be crack cocaine in the baggy." (Tr. 34.)

Officer Rhodeback clarified that the cocaine was found in the "main part of the glove," in the "middle," as opposed to the finger holes. (Tr. 39-40.) On cross-examination, the officer provided further details with respect to his observations regarding the glove:

"[Defense counsel] Q. Okay. So you knew the glove wasn't a weapon?

"[Officer Rhodeback] A. No. The glove itself, yes, I knew wasn't a weapon.

"Q. What about the way that it appeared to you made you think that it was a threat to you?

"A. The way that that appeared to me there is something inside.

"Q. Okay.

"A. *The content of which I have no idea.* That's why I checked and saw what was in there.

"Q. You didn't feel it or anything to try to figure out what was inside?

"A. Pulled it out and looked, shined the flashlight in.

"Q. Well, did you suspect that what was inside of it was a gun?

"A. *No.*

"Q. Did you suspect that what was inside of it was a knife?

"A. *To be honest, I didn't suspect what was in it, that's why I looked.*" (Tr. 75-76; emphasis added.)

An officer conducted a field test of the substance, which tested positive for cocaine. (Tr. 39-40.) Soon thereafter, Mr. Holt was placed under arrest.[1]

Officer Rhodeback testified that he left the glove in the vehicle instead of turning it over to the property room along with the cocaine. When asked why he decided to leave the glove in the car, he responded, "Well, to me [it] was not considered evidence. It wasn't -- I don't know, it just wasn't part of the crime in my opinion." (Tr. 46.)

On cross-examination, Officer Rhodeback clarified that, as he pulled in behind the vehicle which had promptly pulled over, he was adjusting the cruiser's spotlight. At that time, all he saw to arouse his suspicion was Mr. Holt's upper body movement, primarily his shoulders. Soon thereafter, when the officer approached the vehicle, he saw the back seat passenger "bend forward."

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[1]According to the record, the driver of the car was issued a citation for speeding and the other passenger was arrested based upon outstanding warrants.

The officer conceded that he was not able to see Mr. Holt's arms or hands; all he saw was a "forward movement." (Tr. 57-58.)

According to Officer Rhodeback, Mr. Holt told the officer that "they weren't his drugs." Mr. Holt made no other statement. (Tr. 82.) On redirect examination, the officer again clarified that the glove was "more in the reach of the person in the rear." (Tr. 85.)

Significantly, the record does not indicate that any questions were asked at any time regarding ownership of the glove itself.

Officer Clinton A. Smith testified that he had been a patrol officer for almost three years. He was in a separate cruiser "doing speed patrol' at the same location and time Officer Rhodeback was patrolling. When Rhodeback followed and pulled over the vehicle, Smith followed and parked his cruiser behind Rhodeback's. (Tr. 88-89.) Officer Smith's testimony regarding the traffic stop includes the following:

> "A. As I approached the car from the passenger side, I came up on the passenger side and Officer Rhodeback stated,[']did you see him moving?['] At which time - well, prior to that I observed the rear passenger making some gesture forward and making some motions that appeared to me that he was attempting to hide or do

something of an inappropriate nature." (Tr. 89.)

He later described the "gesture" as "making a bending movement at the mid torso, *** a reaching down and a movement of that nature." (Tr. 91.) Officer Smith further explained:

> "I could not see his actual hands or anything of that nature, but it was clear that he was leaning forward and extending himself out toward the front seat." (Tr. 93.)

Officer Smith then asked Mr. Holt to exit the vehicle, and Mr. Holt cooperated. Smith patted him down and placed him in the back seat of his cruiser. Another patrolman, Officer Wood, soon arrived on the scene and assisted Officer Rhodeback in ordering the others to exit the vehicle. (Tr. 95-96.) On cross-examination, Officer Smith conceded that the "leaning forward" motion was consistent with the rear passenger speaking to those in the front seat.

On cross-examination, Officer Smith explained why he believes that "leaning forward" is a sufficient reason to take someone out of a car:

> "A. Well, in the particular area of town we work it's very common to find narcotics or firearms, and when an individual moves in a manner which you're unable to see what they're doing and it's clear -- not actually clear, but they may be attempting to hide

something, we normally remove him from the car." (Tr. 99.)

Smith conceded that it is not "typical" for three cruisers to respond to a lone vehicle allegedly travelling faster than the posted speed limit. (Tr. 100.)

Defense counsel noting that there were three male black occupants in the car, Officer Smith responded that part of the reason he decided to "assist" was because there were "three individuals." When asked by defense counsel if the officer would have decided to "assist" if the occupants were a man, a woman and a child, the officer responded, "probably not." However, if it had been three women, he "probably would have just for officer safety reasons." (Tr. 101-102.)

Following brief arguments of counsel, the trial court promptly sustained Mr. Holt's motion to suppress. The trial court stated the following as its rationale:

> "THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way -- way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that. This gentleman *[sic]*, based upon the totality of evidence I heard from both these

officers, I feel that the search was beyond -- was beyond the scope.

"[PROSECUTION]: Beyond the scope of what?

"THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

"[PROSECUTION]: Your Honor, is the Court stating, then, that the — this evidence would then be suppressed under fruit of the poisonous tree?

"THE COURT: Exactly what I'm saying." (Tr. 118-119.)

While the trial court's rationale in suppressing the evidence is not a model of clarity, the court apparently concluded that the actions of law enforcement personnel in their various searches and seizures which occurred here were unreasonable and improper based upon the "totality of the circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177. In *Bobo,* the Supreme Court of Ohio held, at paragraph two of the syllabus, as follows:

"Where a police officer, during an investigative stop, has a *reasonable suspicion that an individual is armed based on the totality of the circumstances,* the officer may

initiate a protective search for the safety of himself and others." (Emphasis added.)

Neither party contends that the initial traffic stop was unlawful nor otherwise impermissible. Similarly, since Mr. Holt claims no ownership interest in the car, no argument is made that he has standing to challenge the arguably questionable search of the car. Thus, our analysis proceeds first to the warrantless search and seizure of Mr. Holt himself.

Preliminarily, as a threshold issue, we note a significant case rendered recently by the Supreme Court of the United States which compels us to find initially that appellant has no Fourth Amendment complaint as to his being ordered out of the car in the first place. In *Maryland v. Wilson* (1997), 519 U.S. __, 117 S. Ct. 882, the Supreme Court held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. The *Wilson* case expressly expanded the scope of *Pennsylvania v. Mimms* (1977), 434 U.S. 106, wherein the Court ruled that an officer may, as a matter of course, order the *driver* of a lawfully stopped car to exit the vehicle. In essence, the ultimate conclusion of both *Wilson* and *Mimms* was that considerations of "officer safety" outweigh the intrusion into a "*** driver's [or passenger's] liberty occasioned by the officer's ordering him out of the car." *Wilson* at 885. Thus, under the federal Constitution,

appellant clearly cannot complain about being asked to get out of the car.

The Supreme Court of Ohio has followed and applied the *Mimms* rule which "merely dispenses with the requirement that the police officer possess reasonable suspicion of criminal activity before the officer may order the *driver* out of an already lawfully stopped vehicle." (Emphasis added.) *State v. Evans* (1993), 67 Ohio St.3d 405, 408. As noted by the *Evans* court, a "*Mimms* order does not have to be justified by any constitutional quantum of suspicion." *Id.*

We note that other Ohio appellate courts have recently relied upon *Wilson* to sanction law enforcement orders requiring all occupants to exit a lawfully stopped vehicle. See, *e.g., State v. Birchfield* (Aug. 26, 1997), Ross App. No. 97CA2281, unreported (Fourth Appellate District); *State v. Fellows* (May 22, 1997), Cuyahoga App. No. 70900, unreported (Eighth Appellate District); *State v. Hamilton* (Aug. 1, 1997), Montgomery App. No. 16124, unreported, and *State v. Ross* (Aug. 29, 1997), Montgomery App. No. 16135, unreported (Second Appellate District).

Assuming, *arguendo,* that no state constitutional right was violated by law enforcement officials in ordering all occupants out of the car, we proceed in our analysis to the search and seizure of Mr. Holt's person.

With respect to the propriety of the "pat-down" search of Mr. Holt, we first look to *Terry v. Ohio* (1968), 392 U.S. 1. As construed by the Supreme Court of Ohio, the United States Supreme Court's holding in *Terry* allows law enforcement to conduct a "limited protective search of the detainee's person for concealed weapons" only when justified by an officer's reasonable conclusion that "'the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others***. *Evans, supra* at 408, citing *Terry* at 24. In justifying that conclusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 21. The circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Freeman* (1980), 64 Ohio St.2d 291, 295. Thus, the standard for reviewing such police conduct is an objective one. *Terry, supra,* 392 U.S. at 2 1-22; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

Given the state of the record before us and the *Terry* progeny bestowing increasing degrees of deference to an officer's professed objectives for conducting "protective" frisks, we cannot say that the pat-down search of Mr. Holt was unconstitutionally impermissible.

Finally, we now turn to that issue which we deem dispositive of this appeal: whether the defendant has standing to complain about the search of the glove itself, about which search the prosecution urges us to find that Mr. Holt lacks standing to complain.

Suppression of the fruit of a Fourth Amendment violation can be urged only by those whose rights were violated by the search itself. Standing is not achieved solely by a person's status as defendant nor by introduction of damaging evidence. *Alderman v. United States* (1969), 394 U.S. 165. Therefore, before a court may review the reasonableness of police behavior, the defendant must demonstrate that his Fourth Amendment right to privacy was violated. "Fourth Amendment rights are personal rights which *** may not be vicariously asserted." *Rakas v. Illinois* (1978), 439 U.S. 128, 133-134. To establish that his own Fourth Amendment rights have been violated by an illegal search and seizure, a defendant has the burden to demonstrate that he or she has a reasonable expectation of privacy in the area searched. *Id.*

As indicated above in our discussion of the facts of this case, no direct evidence was introduced regarding ownership of the glove itself. However, the state's entire theory upon which it bases its prosecution is that the glove, or at least the contents thereof, belonged to Mr. Holt. Further, police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the

glove from his pocket prior to depositing it on the floor under the seat in front of him. Therefore, we find that he does have standing to challenge the search of the glove.

In *State v. Brown* (1992), 63 Ohio St.3d 349, the issue presented was whether the warrantless search of the defendant's automobile was justified under the line of cases that permits an officer to conduct a warrantless search incident to a lawful custodial arrest *"in order to protect himself from any accessible weapons." Id.* at 350. The Supreme Court of Ohio held, at the syllabus:

> "A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect -- and sole occupant of the vehicle -- under control in the police cruiser. *(New York v. Belton* [1981], 453 U.S. 454, ***, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)"

We believe the same rationale applies here. Based upon the foregoing case law and the evidence delineated above, the police officer had no right to search the glove. According to testimony adduced at the hearing, when the officer picked up the glove, innocuous in and of

itself, it became readily apparent that it did not contain a weapon. There was simply no evidence to suggest what the glove's contents, if any, *appeared* to be. By the officer's own admission, he had no idea what might be contained in the glove. Be could not and did not contend that he felt "threatened" in any way by the glove or its contents. Pursuant to the rule and rationale of *Brown,* the right to search the glove stopped once the officer was aware no weapons were present. Any ensuing searches and seizures were unlawful.

As a result, the assignments of error are overruled.

Having overruled the assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

CLOSE and PETREE, JJ., concur.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOURNAL ENTRY

Tenth Circuit Case Nº. 97-1853
Filed December 9, 1997

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, [filed Dec. 9, 1997]

Plaintiff-Appellant,

v. No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on December 9, 1997, it is the order of this court that the application for reconsideration is denied.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEMORANDUM DECISION

Tenth Circuit Case Nº. 97-1853
Filed December 9, 1997

Pages E-1 thru E-2

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

MEMORANDUM DECISION

Rendered on December 9, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellant.

H. Tim Merkle, for appellee.

ON APPLICATION FOR RECONSIDERATION

TYACK, P.J.

This cause is before the court as the result of the filing of a document entitled "motion for reconsideration" on behalf of the state of Ohio.

The evidence presented at the hearing on the motion to suppress indicated that the glove in question was on the floor under the seat in front of Lamont Holt when the vehicle in which he was riding was pulled over. No evidence was presented which indicated that the glove was not his. No warrants of any kind were involved in the case. The state of Ohio did not demonstrate any lack of standing either in the trial court or on appeal. Given the absence of any warrants, the state of Ohio had the duty to go forward with evidence of a lack of standing for Lamont Holt if the state wished to avoid the consequences of the illegal search conducted.

Treated as an application for reconsideration, pursuant to App.R. 26(A), the "motion" is denied.

Application denied.

CLOSE and PETREE, JJ., concur.

APPENDIX F

FRANKLIN COUNTY, OHIO
COURT OF COMMON PLEAS
CRIMINAL DIVISION

EXCERPT OF TRANSCRIPT OF
SUPPRESSION HEARING

Tenth Circuit Case №. 97-1853
Filed April 14, 1997

Pages F-1 thru F-2

APPENDIX F

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff

vs. Case No. 97CR-02-882

LAMONT Holt,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before Honorable Judge David Fais

***

[Transcript pages 118 and 119—April 15, 1997]

THE COURT: *** Motion is sustained. Motion is sustained.

MR. MERKLE [defense-counsel]: Thank you, Your Honor.

MR. WODARCYK [prosecutor]: Your Honor, may the Court make a record of its reasons for the sustaining of the motion?

THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way — way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that point. I

think it went way beyond that. This gentleman, based upon the totality of evidence I heard from both these officers, I feel that the search was beyond — was beyond the scope.

MR. WODARCYK: Beyond the scope of what?

THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

MR. WODARCYK: Your honor, is the Court stating, then, that the -- this evidence would then be suppressed under fruit of the poisonous tree?

THE COURT: Exactly what I'm saying.

* * *

APPENDIX G

FRANKLIN COUNTY, OHIO
COURT OF COMMON PLEAS
CRIMINAL DIVISION

JUDGEMENT ENTRY

Tenth Circuit Case Nº. 97-1853
Filed April 22, 1997

APPENDIX G

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,
Plaintiff,

[filed Apr. 22, 1997]

vs.

Case No. 97CR-02-882

Lamont Holt,
Defendant.

Judge Fais

ENTRY

For the reasons stated on the record on April 15, 1997, the Court hereby SUSTAINS the motion to suppress filed by defendant.

/s/ Fais 4-22-97
Judge David W. Fais
Franklin County Court of
Common Pleas

APPROVED:

/s/ Steven L. Taylor (as to form only)
STEVEN L. TAYLOR (0043876)
Assistant Prosecuting Attorney

/s/ H. Tim Merkle (by SLT per phone authority)
H. TIM MERKLE (0023458)
Counsel for Defendant

Supreme Court, U.S.
FILED
JUN 26 1998
OFFICE OF THE CLERK

(3)

No. 97-1853

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,
Petitioner,

-vs-

LAMONT L. HOLT,
Respondent.

On Petition for a Writ of Certiorari to
the Ohio Court of Appeals, Tenth Appellate District

PETITIONER'S REPLY BRIEF

RON O'BRIEN
Prosecuting Attorney
Franklin County, Ohio

and

STEVEN L. TAYLOR
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9 pp

QUESTION PRESENTED FOR REVIEW

1. In light of ***United States v. Salvucci***, 448 U.S. 83 (1980), whether a criminal defendant can rely on the prosecution's theory of the case to meet the defendant's burden of proving that he held a legitimate expectation of privacy in the area searched.

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ARGUMENT

A CRIMINAL DEFENDANT CANNOT RELY ON THE PROSECUTION'S THEORY OF THE CASE TO MEET HIS BURDEN OF PROVING THAT HE HELD A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

Respondent asserts that this Court lacks jurisdiction because the Ohio Court of Appeals, Tenth Appellate District, based its "standing" determination on Article I, Section 14, of the Ohio Constitution. However, given the Tenth District's references to federal law, this Court would lack jurisdiction only if the Tenth District set forth a plain statement that it was basing its ruling independently on the Ohio Constitution. ***Michigan v. Long***, 463 U.S. 1032, 1044 (1983). In the present case, the Tenth District made no such "plain statement."

Respondent misreads the Tenth District's opinion when he contends that the Tenth District was relying on the Ohio Constitution to reach its standing determination.

In addressing the question of standing, the Tenth District relied on the Fourth Amendment of the United States Constitution, mentioning that Amendment four times. The Tenth District also expressly relied on two decisions of this Court: ***Alderman v. United States***, 394 U.S. 165 (1969), and ***Rakas v. Illinois***, 439 U.S. 128 (1978). In addressing the standing issue, the Tenth District never mentioned the Ohio Constitution and never cited any Ohio case law.

When petitioner Ohio filed its motion for reconsideration and pointed out the flaws in the Tenth District's analysis, the Tenth District even then did not avail itself of reliance on the Ohio Constitution. The Tenth District may have shied away from relying on the Ohio Constitution because there is probably no exclusionary rule for violations of Article I, Section 14, of the Ohio Constitution, a fact pointed out by petitioner Ohio in its motion for reconsideration. *See* ***State v. Lindway***, 131 Ohio

St. 166, 2 N.E.2d 490 (paragraphs four, five, and six of syllabus), *cert. denied* and *appeal dismissed*, 299 U.S. 506 (1936). Moreover, at the time the Tenth District denied reconsideration, a recent Ohio decision stated that the search-and-seizure protections afforded by the Ohio and United States Constitutions are generally coextensive. ***State v. Robinette***, 80 Ohio St.3d 234, 238-39, 245, 685 N.E.2d 762, 766-67, 771 (1997).

Respondent contends that the Tenth District relied on the Ohio Constitution in another part of its opinion. To be sure, the Tenth District quoted the syllabus language of ***State v. Brown***, 63 Ohio St.3d 349, 588 N.E.2d 113, *cert. denied*, 506 U.S. 862 (1992), but the Tenth District did so only when it discussed the legality of Officer Rhodeback's search. ***Brown*** has no relevance to the standing issue being raised here.

Even if the Tenth District's quotation from ***Brown*** had relevance, that quotation cited ***both*** the Ohio constitutional provision and the Fourth Amendment. This single, passing reference to the Ohio constitutional provision was insufficient to satisfy the "plain statement" requirement, since the Tenth District's opinion otherwise relied on federal law by referring to ***Alderman***, ***Rakas***, and the Fourth Amendment. ***Ohio v. Robinette***, 117 S.Ct. 417, 420 (1996); ***New York v. P.J. Video Inc.***, 475 U.S. 868, 872 n. 4 (1986); ***New York v. Class***, 475 U.S. 106, 109-110 (1986); ***Michigan v. Long***, 463 U.S. at 1040-44.

Respondent errs in relying on parts of Justice Wright's opinion in ***Brown***. First, the Tenth District never relied on that language from Justice Wright's opinion in ***Brown***. The Tenth District instead relied on the *syllabus* of ***Brown***, which referred to the Fourth Amendment. Second, respondent fails to take into account the recent Ohio decision

treating these federal and state constitutional provisions as generally coextensive. ***State v. Robinette, supra***. This latter decision casts some doubt on the *dicta* set forth in Justice Wright's opinion in ***Brown***.

The Tenth District did not plainly state that it was basing its determination of "standing" on the Ohio Constitution. Instead, the Tenth District relied on federal law. As a result, this Court has jurisdiction.

CONCLUSION

Petitioner State of Ohio respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

STEVEN L. TAYLOR
(Counsel of Record)
Asst. Pros. Attorney

Counsel for Petitioner